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No. 99-589

In the Supreme Court of the United States

LISA SHEPPARD,
Petitioner,

v.

MAURICE COOK, CAPTAIN, CHIEF OF THE TEXAS RANGERS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit err in dismissing Sheppard's §1983 claim for violations of her freedom of belief when the record reflects that Sheppard never engaged in any free speech or other expressive conduct revealing her private, tacit beliefs?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Maurice Cook submits this brief in opposition to Lisa Sheppard's petition for writ of certiorari, asking the Court to review the decision of the United States Court of Appeals for the Fifth Circuit. Sheppard alleged that she was not selected as the first female member of the Texas Rangers due to her "feminist beliefs." Sheppard sued Captain Cook under 42 U.S.C. §1983 for violation of her First Amendment free speech rights. The Fifth Circuit dismissed Sheppard's claim after finding that she failed to produce any evidence that she ever engaged in any conduct subject to First Amendment protection. Given the highly unusual fact that Sheppard *never expressed her belief through any expressive conduct*, the Fifth Circuit dismissed her claim without resolving any important questions of constitutional law. Moreover, the Fifth Circuit's

decision does not conflict with the First Amendment jurisprudence of the Court. *See* SUP. CT. R. 10(c). Review of this fact-bound decision would be of little, if any, precedential value and does not warrant the Court's review.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH EXISTING SUPREME COURT PRECEDENT.

A. The Court's First Amendment Jurisprudence Protects a Public Employee Only if the Employee Engaged in Constitutionally Protected Free Speech Conduct.

Sheppard urges the Court to review the denial of her §1983 claim by suggesting that the Fifth Circuit decided an important issue of constitutional law regarding freedom of belief that conflicts with the prior decisions of the Court. In reality, the Fifth Circuit simply denied Sheppard's First Amendment claim because she never engaged in any speech or other expressive conduct subject to First Amendment protection.

In *Connick v. Myers*, 461 U.S. 138, 146 (1983), the Court set out the test for determining whether the First Amendment protects a public employee from adverse employment decisions by her government employer. "To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996). Deciding whether the conduct of the employee is constitutionally protected entails striking "a balance between the interests of

the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 140 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). If the employee meets this initial burden, the government employer still may avoid liability by showing that it would have taken the same action in the absence of the protected conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Implicit in the *Connick* test is the requirement that the employee actually engage in free speech or other expressive conduct. *See Waters v. Churchill*, 511 U.S. 661, 681 (1994) ("The *Connick* test is to be applied to the speech for which [the employee] was fired."). *Connick* expressly noted that the conduct leading to the adverse employment decision must be fairly characterized as constituting speech activity. *Connick*, 461 U.S. at 146. Therefore, in the absence of expressive conduct constituting free speech, a public employee cannot state a claim under §1983 for violation of her First Amendment Rights.

Requiring expressive conduct also comports with the First Amendment's primary aim to fully protect speech upon issues of public concern. "The goal of unfettered interchange of ideas is not frustrated by 'conduct without substantial communicative intent and impact.'" *Jones v. Collins*, 132 F.3d 1048, 1054 (CA5 1998); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (Stevens, J., concurring) ("[E]xpression and communication are the crucial attributes of speech. The scope of the First Amendment is determined by the content of expressive activity.").

In the decision below, the Fifth Circuit did not thumb its nose at the Court's First Amendment jurisprudence. In reality, the Fifth Circuit simply recognized two unremarkable principles of First Amendment law. First, the First Amendment protects a public employee from adverse employment decisions resulting from her free speech or other expressive conduct protected by the First Amendment. And, second, conversely, a public employee must engage in free speech or other expressive conduct in order to be protected by the First Amendment. The court of appeals simply denied Sheppard's §1983 claim because she failed to present any evidence that she ever expressed her private, tacit beliefs through free speech or any other conduct protected by the First Amendment.

B. Providing First Amendment Protection to Government Employees for Private, Tacit Beliefs Would Prove Unworkable Under the Court's Existing First Amendment Jurisprudence.

In First Amendment cases involving adverse employment actions against public employees, "it is the court's task to apply the *Connick* test to the facts." *Waters*, 511 U.S. at 668. However, private, tacit beliefs cannot be evaluated under the *Connick* test because this test correctly assumes that the public employee engaged in some form of speech or other expressive conduct potentially protected under the First Amendment.

Under *Connick*, for example, a court must determine whether free speech or other expressive conduct is constitutionally protected as a matter of law. *Connick*, 461 U.S. at 148 n.7. In order to be constitutionally protected, the speech activity must involve a public concern, not personal

interests. *Id.* at 147. In deciding whether an employee's speech activity addresses a matter of public concern, a court must consider "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. In the absence of record evidence of free speech or other expressive conduct, a court would not be able to resolve whether the employee's speech activity touches on a matter of public concern. To adjudicate private, tacit beliefs under this prong of the *Connick* test, a court would have to assume that if the public employee had actually expressed her private, tacit belief, then it would have fallen under the rubric of matters of public concern. Obviously, courts cannot evaluate private, tacit beliefs unless willing "to indulge in sheer speculation." *Fogarty v. Boles*, 121 F.3d 886, 890 (CA3 1997); *Kyle v. Morton High Sch.*, 144 F.3d 448, 454 (CA7 1998) ("This glaring omission in the complaint leaves total speculation as the only alternative for the court to come up with any set of facts justifying relief. This is not the court's job. To avoid dismissal, the complaint for a First Amendment violation must at least put the defendants on notice that some specific speech or conduct by the plaintiff led to the termination.").

Protecting a public employee under the First Amendment without requiring that she actually express her private belief would also create a serious potential for abuse. Consider the government employer who fires a female employee solely because the employee is female. The public employee obviously may pursue a gender discrimination claim.[1]

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1. The Fifth Circuit noted: "It is worth pause to remember that Sheppard's claim on appeal . . . is for First Amendment violations. She does not allege gender discrimination." *Steadman v. Texas*

However, under Sheppard's analysis, the employee need only *allege that she privately believes in gender equality* (even if she has never engaged in any speech or other expressive conduct supporting gender equality) in order to pursue a First Amendment claim against her employer as well.[2]

In sum, a public employer's alleged improper motive in rendering an adverse employment decision against an employee is insufficient to protect the employee under the First Amendment in the absence of free speech or other expressive conduct.

II. The Decision Below Comports with the Court's First Amendment Jurisprudence and Does Not Create a Conflict Among the Circuits.

In reviewing Sheppard's §1983 retaliation claim for exercising her First Amendment rights, the Fifth Circuit correctly considered the above-mentioned *Connick* factors. 179 F.3d at 366. Thereafter, the court noted that "[a]nother aspect of the test, which should go without saying but which

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Rangers, 179 F.3d 360 (CA5 1999).

2. Similarly, consider the public employer who fires a homosexual employee only because of her sexual orientation. If the public employee is not protected by a state or local ordinance banning such discrimination, the employee may not be able to pursue a discrimination claim. However, under Sheppard's analysis, if the employee alleges that she maintains a private belief in equal rights for homosexuals (even if she has never engaged in any speech or other expressive conduct supporting equal rights), the employee may transform her nonviable discrimination claim into a First Amendment claim.

is central to the case at bar, is [whether] the plaintiff actually spoke or otherwise engaged in free speech activities recognized by our First Amendment jurisprudence." *Id.*

Although the court criticized Cook for "deliberately rigging the selection process" to prevent Sheppard from becoming a Texas Ranger, the Fifth Circuit held that "Cook's bad motive alone [was] insufficient under [the] case law to establish a First Amendment claim." *Id.* at 368-69. Notwithstanding the court's "sense of great consternation," the court's "repeated search of the record failed to disclose anything but a murky link between Sheppard and feminist causes or organizations. What Sheppard lacked was an indicia of support for feminism beyond simply wanting to be a Texas Ranger." *Id.* at 368 n.11. The Court dismissed the claim because "Sheppard presented inadequate proof . . . that she engaged in speech or other activities entitled to protection under the First Amendment." *Id.* at 369.[3]

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3. Subsequently, in *Jones v. Collins*, 132 F.3d 1048, 1055 (CA5 1998), the Fifth Circuit consistently held that a public employee must allege that she engaged in conduct potentially subject to First Amendment protection in order to recover under §1983. In *Jones*, a superintendent demoted a principal because the superintendent mistakenly believed that the principal leaked sensitive information to the public. The principal denied the allegation and sued under §1983 for violation of her First Amendment rights. The Fifth Circuit opined:

> Assuming for the sake of argument that Jones's expression as perceived by Collins would have been subject to constitutional protection . . ., retaliation based on this perception, in the absence of any actual expression by Jones that is subject to First

Sheppard does not allege that the decision below conflicts with a decision of another circuit court as a basis for the Court's jurisdiction. Not surprisingly, public employers rarely retaliate against employees for free speech activity unless the employee actually engaged in some form of expressive conduct potentially subject to First Amendment protection. However, on rare occasion, federal courts have entertained cases in which an employer punished a public employee who denied engaging in any free speech activity. And the Fifth Circuit's decision below harmonizes with the decisions of the other federal courts addressing these similar claims.

For example, in *Fogarty v. Boles*, 121 F.3d 886, 887 (CA3 1997), a public school teacher alleged that he was punished because of the principal's belief that he informed the press about a matter of public interest at the school. The teacher denied ever contacting the press. The Third Circuit rejected the teacher's First Amendment claim out of hand because "there was no conduct that was constitutionally protected—indeed, there was no conduct— period." *Id.* at 890. The court held that "in the absence of speech, . . . there [can be] no constitutional violation cognizable under section

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> Amendment protection, does not constitute a constitutional violation [under First Amendment jurisprudence.]

Id. at 1053; *see also Kline v. North Tex. S. Univ.*, 782 F.2d 1229, 1233 n.5 (CA5 1986) ("Without determining whether the speech in question was in fact 'protected' under the first amendment, we fail to see how the appellants could have dismissed Kline in retaliation for speech that had not yet occurred.").

1983 based on an asserted 'bad motive' on the part of the defendant." *Id.* at 890. The Third Circuit dismissed, concluding that "a free speech claim depends on speech, and there was none in this case." *Id.* (quotation omitted).

Similarly, in *Kyle v. Morton High Sch.*, 144 F.3d 448, 454 (CA7 1998), a former teacher sued the school and members of the school board. The teacher claimed that he was terminated for "political and advocacy reasons" or "perceived political and advocacy activities." However, "nowhere in his sparse complaint does he mention that he uttered any protected speech or engaged in any protected conduct or 'activity' for which he was allegedly fired." *Id.* The Seventh Circuit held:

> To avoid dismissal, the complaint for a First Amendment violation must at least put the defendants on notice that some specific speech or conduct by the plaintiff led to the termination. . . . In other words, it is not enough to allege mere retaliation due to an improper motive; there must be an allegation of protected conduct. There was no violation of free speech rights "when the speech at issue never occurred."

Id. at 454-56 (quoting *Barkoo v. Melby*, 901 F.2d 613, 619 (CA7 1990)).[4] The court expressly recognized that the

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4. In *Barkoo*, a public employee alleged that her employer retaliated against her because she discussed the internal workings of her department with members of the press. 901 F.2d at 619. After pointing out that the employee denied ever providing any information to the press, the Seventh Circuit concluded that First

"gravamen of a First Amendment claim is speech." *Id.* at 456; *see also Garcia v. Williams*, 704 F.Supp. 984 (N.D. Cal. 1988) ("Plaintiff's First Amendment claim fails the first step of the *Mt. Healthy City School District* test: that is, she has not alleged that she engaged in any protected speech. . . . Accordingly, plaintiff has failed to state a claim.").

Moreover, in her petition, Sheppard failed to cite a single case in which a private, tacit belief supported a First Amendment claim. Sheppard relies heavily on political patronage cases. In these cases, public employees were punished, not because of any free speech, but because they were not members of a particular political party or organization.[5] However, in this case, the Fifth Circuit expressly noted that "Sheppard never produced any evidence showing an outward sign of her membership in a feminist organization or support—even tacit support—of a feminist agenda." 179 F.3d at 367-68.

Amendment rights cannot be deprived in violation of §1983 "when the speech at issue admittedly never occurred." *Id.*

5. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (state denied employment, promotions, and transfers to low level employees who were not members of the Republican Party); *Branti v. Finkel*, 445 U.S. 507 (1980) (county public defender threatening to terminate public defenders who were members of the Republican Party); *Elrod v. Burns*, 427 U.S. 347 (1976) (sheriff discharged employees and threatened discharge of other employees because they were not affiliated with the Democratic Party).

Sheppard also relies on cases in which the state illegitimately compelled speech.[6] "While it is true that silence in the face of an illegitimate demand for speech is subject to First Amendment protection, . . . this principle is inapplicable here." *Jones*, 132 F.3d at 1054. Sheppard never contended that Cook demanded that she reveal any private beliefs. "[S]ilence in the absence of a demand for speech . . . does not constitute a form of symbolic expression warranting First Amendment Protection." *Id.* ("The goal of unfettered interchange of ideas is not furthered by 'conduct without substantial communicative intent and impact.'" (quotation omitted)). And nothing in the record indicates that Sheppard intended her silence as communication. Therefore, reliance on those cases is inapposite.

In the remainder of the First Amendment cases cited in the petition, the employer either squelched expression of an employee's belief or punished the employee for actually expressing a belief. Sheppard's reliance on these cases is inapposite.

CONCLUSION

For the reasons stated, Respondent respectfully requests that Sheppard's petition for writ of certiorari be denied.

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6. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (state compelled residents to display the state motto "Live Free or Die" on their license plates); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (state bar compelled applicants to disclose private beliefs regarding communism); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (public schools compelled students to salute flag and recite pledge of allegiance).

Respectfully submitted,

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